UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOSE GENAO	
v.	C.A. No. 03-461-L
UNITED STATES OF AMERICA	

MEMORANDUM AND ORDER

Ronald R. Lagueux, Senior United States District Judge.

Petitioner Jose Genao has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (2000). For reasons stated below, that motion is denied.

I. BACKGROUND AND TRAVEL

On January 19, 2000, petitioner was indicted in a five-count superseding indictment on charges of: (1) conspiracy to distribute and to possess with intent to distribute heroin, in violation of 21 U.S.C. § 846; (2) possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; (3) possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g); (4) possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g); and (5) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (1).[1] The criminal case was initially assigned to Judge Mary Lisi.

[1] Petitioner's wife Margerie Ortiz was also charged in the superseding indictment with conspiracy to possess with intent to distribute heroin and possession of heroin with intent to distribute, in violation of 21 U.S.C. § § 841(a)(1) and 846.

On February 2, 2000 petitioner's court-appointed attorney Michael Lepizzera filed a motion to suppress certain evidence that had been seized during a search of the three-story apartment building where petitioner lived. The search was initiated by state law enforcement personnel pursuant to a search warrant authorizing a search of petitioner's second-floor apartment. Upon their arrival at the premises, petitioner told police that he was acting as landlord for the owner of the building, who lived out of state. He displayed and demonstrated a key to a vacant third-floor apartment, and he and his wife signed a consent form, written in Spanish and English, giving permission to search that floor. During the third-floor search police found drug contraband, including 57 packets of heroin.

Upon seizing this material the officers returned to petitioner's second-floor apartment where one of them said, with the items in hand, "We've got a problem here." Petitioner immediately responded in English, "Everything's mine. I don't want my wife to get in trouble." At that point the detective stopped him and proceeded to advise him of his Miranda rights.[2] In the course of this explanation petitioner several times indicated that he understood those rights. Petitioner then repeated his statement that everything was his and that he did not want to get this wife in trouble.

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Petitioner's motion to suppress sought to exclude both the evidence seized during the search and incriminating statements made by petitioner before and after his Miranda warnings were given. In his written motion, petitioner's counsel argued: (1) that the statements petitioner made prior to receiving Miranda warnings were the product of custodial interrogation; (2) that the search warrant was not supported by probable cause; and (3) that with respect to statements made after petitioner had been advised of his Miranda rights, the government had not shown that he had waived those rights.

At the suppression hearing, counsel for petitioner stated that he was not challenging the voluntariness of petitioner's consent to the search of the third-floor apartment, where the bulk of the incriminating evidence was found. See Transcript of March 7, 2000 Hearing on Motion to Suppress ("3/7/00 Tr.") at 11-12. Counsel also indicated he no longer sought the suppression of petitioner's post-Miranda statements reiterating that the incriminating items belonged to him. Id. at 29-30. Counsel did not address the remaining pre- and post-Miranda statements made by petitioner.

Judge Lisi denied the motion to suppress, and jury impanelment was scheduled for March 21, 2000. On March 13, 2000 petitioner filed a *pro se* motion to dismiss his trial counsel for allegedly rendering ineffective assistance. Judge Lisi held a

hearing on March 20, 2000 and denied the motion. Therefore, Attorney Lepizzera continued to represent petitioner. Judge Lisi subsequently recused herself from the case, and the case was reassigned to this writer.

After a three-day jury trial, petitioner was convicted of possession with intent to distribute heroin, possession of ammunition by a convicted felon, and possession of a firearm by a convicted felon. The jury acquitted petitioner of the charge of possession of a firearm in furtherance of a drug trafficking crime, and this Court directed a verdict of acquittal as to the charge of conspiracy to possess and distribute heroin.[3]

On August 31, 2000 this Court sentenced petitioner to a total of 262 months of imprisonment, followed by a six-year term of supervised release. Petitioner appealed to the U.S. Court of Appeals for the First Circuit, asserting several grounds for reversal: (1) that the search warrant for his second-floor apartment was not supported by probable cause; (2) that his consent to the search of the third floor area was not voluntary; (3) that the incriminating statements he made both before and after he was given Miranda warnings should have been suppressed, as they were coerced in violation of the Fifth and Fourteenth Amendments; and (4) that the Court wrongly denied his motion for

[3] In addition, the Court directed the acquittal of codefendant Ortiz on both of the charges against her.

new counsel. The Court of Appeals affirmed the conviction, see United States v. Genao, 281 F.3d 305 (1st Cir.2002), and the U.S. Supreme Court denied certiorari on October 7, 2002. Genao v. United States, 537 U.S. 901, 123 S.Ct. 216 (2002).

The instant motion to vacate was filed on October 6, 2003. As grounds petitioner asserts: that he received ineffective assistance of counsel at the suppression hearing in view of his counsel's failure (a) to contest the validity of his consent to the search of the third floor (Petition at ¶ 12A, Ground 1), and (b) to argue that his post-Miranda statements were not voluntarily made (id. at ¶ 12D, Ground 4); that the Court's denial of his pretrial motion to dismiss his counsel deprived him of his Sixth Amendment right to counsel at trial (id. at ¶ 12B, Ground 2); that his attorney's actions in preparing for and during the course of trial constituted ineffective assistance of counsel (id. at ¶ 12C, Ground 3); and that the search warrant authorizing the search of his residence was not supported by probable cause (id. at 12E, Ground 5).

On March 15, 2004 Petitioner also filed a *pro se* Motion to Supplement [his] Pending Motion under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence ("motion to supplement"), asserting two additional claims: (1) that the prior state convictions used to enhance his sentence were illegally and unconstitutionally obtained, thus rendering the enhancement of

his federal sentence invalid; and (2) that he had previously been charged with and convicted in state court of the same offenses for which he was convicted in this Court.

The government has filed an objection and memorandum in opposition to both the original motion to vacate and the motion to supplement. Petitioner seeks an evidentiary hearing on all of his claims.

II. DISCUSSION

The pertinent section of § 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence is in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255, ¶ 1.

Generally, the grounds justifying relief under 28 U.S.C. § 2255 are limited. A court may grant such relief only if it finds a lack of jurisdiction, constitutional error or a fundamental error of law. United States v. Addonizio, 442 U.S. 178, 184-185, 99 S.Ct. 2235 (1979). "[A]n error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice." Id. at 185 (internal

quotations omitted).

Moreover, a motion under § 2255 is not a substitute for direct appeal. United States v. Frady, 456 U.S. 152, 165 (1982). A movant is procedurally precluded from obtaining § 2255 review of claims not raised on direct appeal absent a showing of both "cause" for the default and "actual prejudice" or, alternatively, that he is "actually innocent" of the offenses for which he was convicted. Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted). See Brache v. United States, 165 F.3d 99, 102 (1st Cir.1999). However, claims of ineffective assistance of counsel are not subject to this procedural hurdle. See Knight v. United States, 37 F.3d 769, 774 (1st Cir. 1994).

Here, none of the claims raised by petitioner entitles him to relief, as discussed below.

A. Previously-Raised Claims

As a threshold matter, the Court notes that several of petitioner's claims here were raised on direct appeal. First, the claim that the warrant for the search of his second-floor apartment was not supported by probable cause (Ground 5, see Jose Genao's Memorandum in Support of Petition Pursuant to 28 U.S.C §2255 ["Pet. Mem."] at 9-12) was rejected by the Court of Appeals. See Genao, 281 F.3d at 308-309 (rejecting arguments concerning sufficiency of affidavit supporting search warrant).

Second, Petitioner's arguments concerning the voluntariness

of (a) his consent to the search of the third-floor apartment (Ground 1, Pet. Mem. at 1-4) and (b) his pre- and post-Miranda statements (Ground 4, Pet. Mem. at 8-9) – while couched as ineffective assistance claims – address the merits of those issues, and to that extent were likewise addressed and rejected on direct appeal. See Genao, 281 F.3d. at 309-310 (rejecting argument that consent to the search of third-floor apartment was not voluntary); id. at 310-311 (rejecting claim that pre- and post-Miranda statements should have been suppressed).[4]

Petitioner's claim concerning the denial of his pretrial motion for new counsel (Ground 2, Pet. Mem. at 4-6) was also addressed on direct appeal. Petitioner had argued that Judge Lisi had committed reversible error by denying his motion for new counsel without making a sufficient inquiry into the nature and grounds of petitioner's dissatisfaction – namely, that his court-appointed counsel misadvised him to plead guilty in a related state court proceeding (in which he was represented by other counsel) and failed to contact potential exculpatory witnesses for his federal trial. The Court of Appeals affirmed the ruling, finding that Judge Lisi's inquiry into petitioner's prior state court guilty plea was adequate, Genao, 281 F.3d at 312-313, and that her consideration of petitioner's complaints concerning his

[4] To the extent that Petitioner complains of counsel's failure to argue these points at the suppression hearing, the claim is addressed infra.

counsel's trial preparation did not constitute an abuse of discretion. Id. at 313-314.[5]

Petitioner is therefore precluded from re-asserting any of the foregoing claims here. It has long been established that claims raised and decided on direct appeal from a criminal conviction may not be re-asserted in a § 2255 proceeding. See Singleton v. United States, 26 F.3d 233, 240 (1st Cir. 1994) ("issues disposed of in any prior appeal will not be reviewed again by way of a 28 U.S.C. § 2255 motion"), quoting Dirring v. United States, 370 F.2d 862, 864 (1st Cir. 1967); Argencourt: v. United States, 78 F.3d 14,16 n.1 (1st Cir. 1996).[6]

B. Ineffective Assistance Claims

Petitioner asserts that he received ineffective assistance in view of his counsel's omissions in connection with (1) the motion to suppress and (2) trial. These claims have no merit.

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[5] The Court of Appeals noted that further questions concerning counsel's failure to present a defense involving exculpatory witnesses could be raised by petitioner in a postconviction motion under 28 U.S.C. § 2255. Genao, 281 F.3d at 313. Petitioner has done so in the instant proceeding, and this claim is discussed, infra.

[6] It is questionable whether petitioner's claims challenging his consent to search the third-floor apartment and the validity of the search warrant for the second floor may be asserted in this § 2255 proceeding, even if not raised on direct appeal. See Arroyo v. United States, 195 F.3d 54, 55 n. 1 (1st Cir. 1999)(reserving this issue while noting that Supreme Court has hinted, and other circuits have expressly held, that Fourth Amendment claims may not be raised in §2255 proceeding) (citing cases). However, this Court need not decide that question here.

1. Principles

A defendant who claims that he was deprived of his Sixth Amendment right to effective assistance of counsel must demonstrate:

(1) That his counsel's performance "fell below an objective standard of reasonableness"; and

(2) "[A] reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). See Cofske v. United States, 290 F.3d 437, 441 (1st Cir. 2002).

The defendant bears the burden of identifying the specific acts or omissions constituting the allegedly deficient performance. Conclusory allegations or factual assertions that are fanciful, unsupported or contradicted by the record will not suffice. Dure v. United States, 127 F.Supp.2d 276, 279 (D.R.I. 2001) (citing Lema v. United States, 987 F.2d 48, 51-52 (1st Cir. 1993)); see also Barrett v. United States, 965 F.2d 1184, 1186 (1st Cir. 1992) (summary dismissal of § 2255 motion is proper where, *inter alia*, grounds for relief are based on bald assertions).

In assessing the adequacy of counsel's performance:

> [T]he Court looks to "prevailing professional norms." A flawless performance is not required. All that is required is a level of performance that falls within generally accepted boundaries of competence and provides reasonable assistance under the circumstances.

Ramirez v. United States, 17 F. Supp. 2d 63, 66 (D.R.I. 1998) (quoting Scarpa v. Dubois, 38 F.3d 1, 8 (1st Cir. 1994) and citing Strickland, 466 U.S. at 688).

The standard applied in making that assessment is a highly deferential one. Thus,

> [The] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Counsel's judgment need not be right so long as it is reasonable. United States v. McGill, 11 F.3d 223, 227 (1st Cir. 1993). Furthermore, reasonableness must be determined "[without] the distorting effects of hindsight." Strickland, 466 U.S. at 689.

2. Request for Evidentiary Hearing

As a threshold matter, the Court addresses petitioner's request for an evidentiary hearing on his claims. A prisoner who invokes §2255 is not entitled to an evidentiary hearing as a matter of right. See United States v. McGill, 11 F.3d 223, 225 (1st Cir. 1993). Rather he "bear[s] the burden of establishing by the preponderance of the evidence before the district court that [he is] entitled to a hearing." Myatt v. United States, 875 F.2d 8, 11 (1st Cir. 1998), citing United States v. DiCarlo, 575 F.2d 952, 954 (1st Cir 1987), cert. denied, 439 U.S. 834, 99 S.Ct. 115 (1979).

Here, petitioner has made no showing that an evidentiary hearing is needed to resolve his claims. Counsel's actions at both the suppression hearing and at trial are a matter of record. Indeed, the factual basis of petitioner's ineffective assistance claims concern what his counsel did not do (e.g., failure to contest petitioner's consent to the third floor search or to challenge the search warrant; failure to make an opening statement or to call defense witnesses), rather than what he did do.

The cases cited by petitioner in support of his evidentiary hearing request do not assist him. In Ciak v. United States, 59 F.3d 296 (2d Cir. 1995), the only decision which is even arguably relevant, the district court's denial of an evidentiary hearing was reversed because petitioner had alleged actual conflicts of interest on the part of his trial counsel which, if proved, would have entitled petitioner to relief. Id. at 306-307. Here, by contrast, there are no issues of attorney conflict of interest, and petitioner has alleged no facts concerning counsel's performance which, if true, would raise a substantial likelihood of a different outcome at trial.

Thus, because the files and records of this case conclusively establish, in light of the legal principles set forth above, that the claims in the petition are without merit, as discussed infra, no hearing is required in connection with any

issues raised by the Petition. See United States v. David, 124 F.3d 470, 477 (1st Cir. 1998) ("Even if a hearing is requested, a district court properly may forgo it when (1) the motion is inadequate on its face, or (2) the movant's allegations, even if true, do not entitle him to relief, or (3) the movant's allegations need not be accepted as true because they state conclusions instead of facts, contradict the record, or are inherently incredible.") (internal quotations omitted). See also Panzardi-Alverez v. United States, 879 F.2d 975, 985 n.8 (1st Cir. 1978) (no hearing is required where the district judge is thoroughly familiar with the case).[7]

3. Counsel's Performance at Motion to Suppress

Petitioner claims that his counsel was ineffective at the hearing on the motion to suppress in failing to specifically challenge: (1) the voluntariness of petitioner's consent to search the third floor; and (2) the admissibility of his "alleged confession." See Pet. Mem. at 2, 6, 8. The ineffective assistance aspect of these claims is not discussed at any length in petitioner's papers, and thus the claims are subject to rejection on this threshold basis. See United States v. Bongiorno, 106 F.3d 1027, 1034 (1st Cir.1997) ("We have

[7] The fact that the hearings on the motion to suppress and the motion to dismiss counsel were conducted by Judge Lisi, rather than the undersigned, does not create any need for an evidentiary hearing. The transcripts of both hearings have been reviewed by the Court, and there are no pertinent factual issues left unanswered from those transcripts.

steadfastly deemed waived issues raised on appeal in a per-functory manner, not accompanied by developed argumentation..."); United States v. Zannino, 895 F.2d 1, 17 (1st Cir.) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."), cert. denied, 494 U.S. 1082, 110 S.Ct. 1814 (1990).

Even if these claims, nonetheless, warrant consideration, they are in any event without merit. First, counsel's declination to contest the voluntariness of petitioner's consent to the third-floor search was not objectively deficient, given defendant's undisputed conduct in voluntarily displaying and demonstrating a key to the third floor to police and his voluntary statements to police both before and after he was given Miranda warnings. Counsel is not required to pursue claims that patently lack merit. See United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (right to effective assistance of counsel does not require the "useless charade" of presenting a meritless defense); Hughes v.United States, 241 F.Supp.2d 148, 156 (D.R.I. 2003)(same).

Second, even if counsel was somehow deficient in not pressing these challenges, there was no prejudice, as both challenges were discussed and rejected on direct appeal. See Genao, 281 at 309-310 (noting that petitioner had executed a consent form in Spanish and English and had displayed and

demonstrated a key to the third-floor apartment); and id. at 311 (concluding that post-Miranda "second confession" was admissible, in view of court's conclusion that the pre-Miranda "first confession" was admissible).

Thus, because petitioner has not established a meritorious constitutional claim as to either of those two issues, there was no prejudice to petitioner from his counsel's failure to raise them, and his ineffective assistance claim regarding these matters must fail. See Kimmelman v. Morrison, 477 U.S. 365, 382, 106 S.Ct. 2574 (1986)(defendant who asserts a claim alleging his counsel's ineffectiveness at a suppression hearing must establish as a threshold matter that his Fourth Amendment claim is "meritorious"); Strickland, 466 U.S. at 694 (1982)(must show prejudice, i.e., reasonable probability of different result).

4. Counsel's Performance at Trial

Petitioner further argues that his trial counsel's failure to give an opening statement and to call witnesses on his behalf at trial constituted ineffective assistance. These claims likewise do not warrant relief.

"A trial counsel's failure to make an opening statement ... does not automatically establish the ineffective assistance of counsel." Moss v. Hofbauer, 286 F.3d 851, 863 (6th Cir. 2002), citing United States v. Haddock, 12 F.3d 950, 955 (10th Cir. 1993). See also United States v. Rodriguez-Ramirez, 777 F.2d

454, 458 (9th Cir. 1985) (decision to make opening statement and timing of such statement is ordinarily a matter of trial tactics and in such cases will not constitute a basis for an ineffective assistance claim); United States v. Salovitz, 701 F.2d 17, 20-21 (2d Cir. 1983)(same).

Here, the record shows that petitioner's counsel reserved his right to make an opening statement until after the government's case, see Transcript of Trial Proceedings on May 23, 2004 ("5/23/00 Trial Tr.") at 37, and subsequently rested without either making an opening statement or calling any defense witnesses. See Transcript of Trial Proceedings on May 24, 2004 ("5/24/00 Trial Tr.") at 81. Counsel's defense strategy was to show, through the cross-examination of government witnesses, that petitioner had no knowledge of drugs or guns on the third floor and that petitioner would not have consented to the search of such premises had he known that the firearm and drugs were there. Counsel's decision not to call defense witnesses and the tenor and content of his closing argument were both consistent with this defense strategy. See Transcript of Trial Proceedings on May 25-26, 2004 ("5/25/00 Trial Tr.") at 22-34.

While in light of petitioner's conviction, this may not have been the most effective defense, this Court cannot say that counsel's actions fell so far below the standard of proficiency as to constitute ineffective assistance, particularly in light of

the strong evidence against petitioner. See Strickland, 466 U.S. at 689 (reasonableness of counsel's performance must be determined "[without] the distorting effects of hindsight").[8]

Moreover, petitioner was not prejudiced by his counsel's strategy. Petitioner has not made any showing as to how an opening statement would have created the reasonable probability of a different outcome at trial. See Nguyen v. Reynolds, 131 F.3d 1340, 1350 (10th Cir. 1997) ("Defense counsel's failure to make an opening statement was nothing more than a tactical decision that did not adversely affect [defendant]."). Nor has he identified any exculpatory witnesses who would have benefitted his case at trial.

The affidavits submitted by petitioner do not assist him. The affidavit of petitioner's postconviction counsel Martin Flax, even apart from its obvious hearsay problems,[9] merely states that the landlord was not contacted by trial counsel prior to trial and contains nothing to suggest that petitioner's landlord would

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[8] Counsel's defense strategy had some limited success to the extent Petitioner was acquitted by the jury on Count 5 (possession of firearm in furtherance of drug offense) and acquitted by the Court as to Count 1 (conspiracy to possess and distribute drugs).

[9] The Flax affidavit describes conversations between a private investigator hired by Attorney Flax and the landlord of the building in which petitioner lived and is not made on personal knowledge. As such, the affidavit presents totem-pole hearsay problems and is inherently unreliable. See F.R.Evid. 805; United States v. Ferber, 966 F.Supp. 90, 96 (D.Mass. 1997)(in multiple or "totem pole" hearsay each out-of-court statement must fall within an exception to the prohibition against the introduction of hearsay).

have given exculpatory testimony (e.g., disputing petitioner's ownership of the drugs and contraband found on the third floor). See Affidavit of Counsel dated October 6, 2003 at ¶ 2-3. Given the fact that petitioner had displayed a key and volunteered that he controlled the third floor access in the landlord's absence, trial counsel could have reasonably concluded that the landlord would not have been helpful.

Similarly, petitioner's own affidavit merely asserts his belief that his landlord would have testified that petitioner was not the owner or manager of the building and was not a resident of the third-floor apartment. See Affidavit of Jose Genao dated October 6, 2003 at ¶ 14. Neither of these facts is material, however, to the issue of petitioner's guilt, i.e., whether he possessed the drugs found on the third floor with intent to distribute. Notably, petitioner's affidavit makes no averment of his innocence of the charges of which he was convicted, nor does it name any other exculpatory witnesses who would have testified on his behalf.

Finally, the fact that during voir dire counsel briefly mentioned the names of certain individuals to prospective jurors in an effort to determine whether any juror was acquainted with those individuals does not change this result. Contrary to petitioner's assertions on this point, the record shows that counsel's inquiry did not characterize the individuals as

potential witnesses. See Transcript of Trial Proceedings on May 19, 2004 ("5/19/04 Trial Tr.") at 61. It is highly speculative that, based on this single reference, any trial juror even recalled the named individuals, much less drew an adverse inference from petitioner's failure to call any of them as witnesses.

Because petitioner has made no showing of a reasonable probability of any different outcome had trial counsel presented witnesses on his behalf, his claim is without merit. See Genao, 281 F.3d at 313 (disagreement between client and counsel on how best to structure a defense "does not normally establish the sort of conflict that on its own deprives the defendant of an adequate defense") (citing Strickland, 466 U.S. at 688-691).[10]

In view of these considerations, it is clear that trial counsel's performance at both the suppression hearing and at trial was neither objectively deficient nor prejudicial to defendant, and therefore petitioner's ineffective assistance

[10] Edens v. Hannigan, 87 F.3d 1109 (10th Cir. 1996), a § 2254 habeas case cited by petitioner, is readily distinguishable from the instant case. There, counsel represented both Edens and a codefendant at a state court trial on charges of murder-robbery, and during trial made a number of tactical decisions in favor of the codefendant client and against the interests of Edens, including the omission of an opening statement. The court found that an actual conflict of interest existed as a result of counsel's dual representation and granted relief on Edens' ineffective assistance claims. Id. at 1118. Here, by contrast, there was no dual representation or conflict; rather petitioner's claims attack the defense strategy chosen by his trial counsel for a single client, an issue not present in Edens.

claims must fail.[11]

C. Motion to Amend Petition

Petitioner's motion to supplement[12] seeks to amend his motion to vacate pursuant to F.R.Civ.P. 15(c) by adding two new ineffective assistance claims: that his counsel (1) failed to object to the use of the two prior state court convictions used to enhance petitioner's sentence; and (2) failed to raise a double jeopardy argument that petitioner had previously been convicted in state court of the same crime of which he was convicted in this Court. The government has objected to the motion to supplement on the grounds that the claims raised therein are untimely.

As noted above, petitioner's conviction became final on October 7, 2002, almost eighteen months prior to the filing of these two new claims. Therefore, the two new claims are time-barred under the one-year statute of limitations set forth in § 2255(1), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214

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[11] Petitioner's claims that his trial counsel failed to advise him as to the reasons for Judge Lisi's recusal and "on the pros and cons of having [the undersigned] recuse himself" (Petition, ¶12C) do not warrant discussion and in any event are without merit.

[12] Although the motion is styled a "Motion to Supplement," it seeks to amend, rather than supplement, the original petition, as the underlying facts supporting the new claims occurred prior to the filing of the original claims. See Hicks v. United States, 283 F.3d 380, 385-386 (D.C. Cir. 2002)(discussing the difference between claims amending original claim and supplemental claims).

("AEDPA"), unless those claims relate back to a claim contained in the original Petition. See Fed.R.Civ.P. 15(c)(2).

While the First Circuit has not directly addressed the issue of the applicability of the relation-back doctrine under rule 15(c) to an otherwise time-barred claim in a §2555 petition, a number of other circuits have done so. These courts have held that to relate back, an amended § 2255 claim must have more in common with the timely filed claim than the mere fact that they both arose out of the same trial and sentencing proceedings; rather, the old and new claims "must have arisen from the same set of facts and not from occurrences totally separate and distinct, in both time and type, from those raised in [the] original motion." United States v. Hicks, 282 F.3d 380, 388 (D.C. Cir. 2002)(internal quotations omitted).[13]

In the instant case, the new claims asserted concerning the enhancement of petitioner's sentence and double jeopardy issues

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[13] See United States v. Thomas, 221 F.3d 430, 436-4 37 (3d Cir. 2000); (Rule 15[c] allows habeas amendment to relate back as long as it does not add "entirely new claim"); United States v. Pittman, 209 F.3d 314, 317-18 (4th Cir.2000) (additional §2555 claims did not relate back because they involved separate occurrences of "both time and type"); and United States v. Craycraft, 167 F.3d 451, 457 (8th Cir.1999) (§2555 amendment did not relate back because ineffective assistance of counsel claims did not arise out of "same set of facts" and involved separate occurrences of "both time and type"); United States v. Espinoza-Saenz, 235 F.3d 501 (10th Cir. 2000)(amendment to §2555 claims did not relate back because ineffective assistance of counsel claims were "totally separate and distinct in time and type from those raised in original motion"); Davenport v. United States, 217 F.3d 1341, 1346 (11th Cir.2000) (amendment to §2555 claims did not relate back because they did not arise from "same set of facts"), cert. denied, 532 U.S. 907, 121 S.Ct. 1232 (2001).

arise out of facts separate and distinct from the facts giving rise to the initial claims concerning the search of petitioner's apartment building, the use of petitioner's incriminating statements, and counsel's trial strategy. Because these new claims do not relate back, they are untimely and may not be asserted here, and the motion to supplement must be denied.

Even if deemed timely, neither of the two new claims asserted would succeed on the merits. The first new claim is premature, as the constitutionality of a state court conviction, including one used to enhance a subsequent federal sentence, must first be challenged in state court. See Brackett v. United States, 270 F.3d 60, 65-66 (1st Cir. 2001)(absent a Gideon challenge, prisoner seeking to overturn a federal sentence enhanced due to prior state conviction should initially challenge validity of prior conviction in state court).[14]

The second proposed claim fails as a matter of law, as it is well-settled that a defendant may be charged under both state and federal law for the same criminal conduct without violating the Double Jeopardy Clause. See United States v. Peterson, 1999 WL 33649848 at *2 (D.R.I. July 16, 1999)(there is no constitutional

[14] Should petitioner succeed in overturning any of his prior state court convictions, he is free to bring a §2255 petition to challenge his enhanced sentence, subject to the pertinent limitations period in § 2255. See Brackett, 270 F.3d at 68 (holding that "the operative date under § 2255(4) [for filing a § 2255 petition based on the vacating of a prior state conviction] is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction").

rule that prohibits a state and the federal government from both prosecuting a person based on the same actions), citing United States v.Wheeler, 435 U.S. 313, 328-30, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); United States v. Bonilla Romero, 836 F.2d 39, 42 n. 2 (1st Cir.1987), cert. den. 488 U.S. 817, 109 S.Ct. 55 (1988) and United States v. Benmuhar, 658 F.2d 14, 18 (1st Cir.1981). Thus, counsel cannot be faulted for failing to raise an argument that was doomed as a matter of law.

In short, the claims belatedly asserted in petitioner's motion to supplement are both untimely and futile, and thus the motion must be denied.

This Court has reviewed petitioner's other claims, including those raised in his undated affidavit in support of the motion to supplement, and finds them to be without merit.

III. CONCLUSION

For all of the foregoing reasons, petitioner's motion to supplement is denied, and the motion to vacate sentence is denied and dismissed.

IT IS SO ORDERED:

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Ronald R. Lagueux
Senior U.S. District Judge
June , 2004